91-23

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOELLYN GRAY, CHRISTOPHER M. SMITH, MALCOLM HALL, JR., BEEKMAN [illegible]. BEAVERS, DAVID ERB, and ALBERT DURYEA, *Petitioners*,

v.

THE TOWN OF DARIEN, The Board of Selectmen, Board of Finance and other Boards and Commissioners, acting singly or in concert, in whole or in part, together with all officers, employees, agents and attorneys thereof, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does a law regarding referenda dilute the voting rights of Petitioners in violation of the equal protection clause of the fourteenth amendment to the United States Constitution by requiring that opponents of a decision of town officials to further indebt the community by issuing $2 million dollars in bonds to achieve both a majority of the votes in a referendum as well as the votes of 25% of the registered voters as of the last general election, especially where, as here, Respondents made it virtually impossible to achieve the 25% threshold level by (1) significantly reducing the number of polling places from the customary three-to-six to just a single polling place, and (2) sharply curtailing the hours of the only polling place from the customary 6:00 a.m. to 8:00 p.m. period to 12:00 noon to 8:00 p.m., thereby eliminating the crucial 6:00 a.m. to noon voting hours during which over 50% of the votes were cast in the previous general election?

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the caption, the following individuals were plaintiffs below but did not join in this petition:

Elizabeth B. Jones
Frank Conant
John L. Goodall
Peggy J. Stephens
John D. Stephens

A notice, pursuant to Supreme Court Rule 12.4, has been filed with the Clerk of the Court and served as required by Rule 29, stating the Petitioners' belief that the above parties have no interest in the outcome of this petition.

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JOELLYN GRAY, CHRISTOPHER M. SMITH, MALCOLM HALL, JR., BEEKMAN V. BEAVERS, DAVID ERB, and ALBERT DURYEA,

Petitioners,

v.

THE TOWN OF DARIEN, The Board of Selectmen, Board of Finance and other Boards and Commissioners, acting singly or in concert, in whole or in part, together with all officers, employees, agents and attorneys thereof,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Joellyn Gray, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on March 1, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix ("App.") A, *infra* 1a) is reported at 927 F.2d 69 (2d Cir. 1991). The opinion and judgment of the United States District Court for the District of Connecticut (App. B, *infra* 12a) was not reported.

JURISDICTION

The judgement of the United States Court of Appeals for the Second Circuit was entered on March 1, 1991. On May 20, 1991, this Court granted Petitioners' motion to extend the time to file the petition for certiorari until and including June 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal protection clause of the fourteenth amendment to the United States Constitution states in pertinent part: "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Section 58(a) of the Darien Town Charter provides:

> Any action of the town meeting described in section 57 of this act shall be subject to overrule as follows: If a petition, drawn in accordance with section 7-9 of the state statutes as amended, signed by as many electors as are not less than five per cent of the electors of the town as of the last annual municipal election, is filed with the town clerk

> during said ten-day period, requesting that the action be referred to a vote of all the electors of the town, the board of selectmen shall promptly call a special electors' meeting to be held as soon as practicable thereafter, for the purpose of voting approval or disapproval of such action.

Section 58(e) of the Darien Town Charter provides:

> Any action so submitted to a special electors' meeting shall stand approved unless a majority of those voting thereon shall have voted "No" and such majority shall exceed in number twenty-five per cent of all the electors of the town as of the last annual municipal election.

STATEMENT OF THE CASE

This lawsuit had its origin on December 12, 1988, when the Representative Town Meeting of Darien, Connecticut, at the request of the Darien Board of Selectmen, voted to issue $2 million in bonds to finance moderate-income rental housing. However, a number of residents of the town, including Petitioners, opposed the bond decision and initiated a petition drive to place on the ballot a town-wide referendum to overturn the bond financing proposal.

In past elections -- whether general or special elections -- there have been three to six polling places. App. A at 4a; App. B at 14a. In past elections the hours of the polling places have been from 6:00 a.m. to 8:00 p.m. *Id.* However, for the election to overturn the Darien government officials' bond decision, the Board of Select-

men limited the number of polling places to only one, and sharply limited the operating hours for that single polling place from the normal 6:00 a.m. to 8:00 p.m. period to 12:00 noon to 8:00 p.m. App. A at 3a, 4a; App. B at 14a. Significantly, in the previous general election, the majority of the votes (not counting absentee ballots) were cast before noon. App. C at 25a. The number of polling places was thus reduced by at least 66% and the hours of operation were reduced 43%.

The number of polling places and their hours of operation were significant because the total number of votes cast was crucial in determining the outcome of the referendum. The Darien Town Charter requires that in order for the citizens of Darien to overturn a decision of the Representative Town Meeting in a referendum, the votes of opponents of the town decision both must constitute a majority of the votes cast and must exceed 25% of the town's registered voters as of the last annual municipal election. App. A at 3a; App. B at 15a.

The bond referendum was held on February 7, 1989. The vote was 2,334 against the bond issue and 1,508 votes in favor; in other words, more than 60% of those voting opposed the bond issue. App. A at 6a; App. B at 15a. However, as there were 10,384 registered voters at the time of the previous municipal election, the town charter required the opponents to garner at least 2,596 votes in order to defeat the bond issue. App. B at 15a. The "no" vote thus was 262 votes short of the required 25% threshold. Hence, Petitioners were unable to overturn the Town of Darien's bond decision despite obtaining the support of a significant majority of those voting.

On March 16, 1989, a number of citizens including Petitioners filed a lawsuit in U.S. District Court for the District of Connecticut to overturn the bond decision.

App. A at 5a; App. B at 12a. The plaintiffs alleged several causes of action including the claim that the Town of Darien and other defendants deprived Petitioners of their constitutional right to equal protection of the laws by diluting the votes of the opponents of the bond issue. App. B at 13a.

On June 29, 1990, the district court granted the defendants' motion for summary judgment. App. A at 5a. The court held that the 25% threshold requirement of the Darien Town Charter was similar to the super-majority requirement upheld in *Gordon v. Lance*, 403 U.S. 1 (1971), and hence constitutional. App. B at 16a-17a. The court, quoting *Whalen v. Heiman*, 373 F. Supp. 353 (D. Conn. 1974), stated that the 25% requirement serves a legitimate state interest in that it prevents the rejection of a decision of the town's government officials by a faction of voters who do not represent the best interests of the other town residents. App. B at 16a. The court also held that the plaintiffs failed to come forward with evidence to show that the reduction in the number of polling places and hours for voting affected the voter turnout. App. B at 22a.

Petitioners filed a timely notice of appeal. On March 1, 1991, the U.S. Court of Appeals for the Second Circuit upheld the lower court's decision granting summary judgment. App. A at 2a. The court of appeals also held that *Gordon* was controlling and that the Darien Town Charter's 25% threshold level was non-discriminatory. App. A at 7a. The court of appeals also agreed with the district court that Petitioners failed to come forward with evidence that the reduction in the number of polling places and hours of polling actually affected voter turnout. App. A at 9a.

REASONS FOR GRANTING THE WRIT

I. THE TOWN OFFICIALS' MANIPULATION OF ELECTIONS LAWS IN A MANNER THAT DILUTED THE VOTES OF THE OPPONENTS OF THOSE SAME POLITICAL OFFICIALS DENIED PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

A. The Decision of the U.S. Court of Appeals for the Second Circuit Failed to Carefully Scrutinize the Restrictions Placed Upon Petitioners' Fundamental Right to Vote.

The electoral scheme devised by Respondents -- designed as it was to prevent passage of referenda challenging the actions of entrenched town officials by imposing severe restrictions, absent from other elections conducted in Darien -- violated Petitioners' constitutional right to equal protection of the laws. The contrary decision of the U.S. Court of Appeals for the Second Circuit conflicts with the numerous decisions of this Court which recognize that voting is a fundamental right and that procedures that impact upon that right on a non-uniform basis must be carefully scrutinized. The Court should grant certiorari in order to establish clear standards regarding when state and local governments are permitted to place restrictions on the concept of majority rule, and the extent to which they may impose those restrictions in some types of elections and not in others.

Section 58(e) of the Darien Town Charter requires that voters who seek to overturn a decision of the town government officials through a referendum both achieve a majority of the actual votes cast and receive at least 25% of the votes of the eligible voters from the last general election. The 25% threshold requirement applies

only to referenda seeking to overturn decisions of the town government officials and not to any other elections.

In addition, the politicians in control of the government of Darien manipulated the election procedures so as to reduce voter turnout. First, the government officials reduced the number of polling places from the customary three to six to just a single polling place.

Second, the hours that the single polling place were open were reduced from the customary 6:00 a.m. to 8:00 p.m. period to just 12:00 noon to 8:00 p.m.

Most significantly, the voting records from the previous general election demonstrate that the majority of votes in that prior election were cast before 12:00 noon. App. C at 25a. Yet the government officials of Darien did not open the single polling place until noon. The fact that voter turnout was adversely affected by a reduction in the number of polling places and the hours those polling places were open is not only a reasonable inference but a self-evident fact.

In most elections, the candidate or the issue which receives a majority of the votes cast wins no matter how low the voter turnout. Even where super majorities are required, the voter turnout is generally irrelevant as long as the winner achieves the percentage necessary to pass the ballot measure. However, in the Darien bond referendum, the voter turnout was a key factor in deciding whether the politicians who controlled the Darien town government or the opponents of "city hall" would win the election. Because the Darien Town Charter required opponents of the town officials' position to achieve not only a majority of the votes to overturn a decision of the town officials but also a threshold vote of 25% of the

eligible voters -- as of the last general election -- voter turnout was the key to success or defeat.

While the opponents of the bond issue achieved not only a majority of the votes but a "super-majority," they still lost the election because of a failure to achieve the votes of 25% of the eligible voters. App. A at 4a, 6a; App. B at 15a. The political officials of Darien, by sharply reducing the number of polling places and the hours of the election, manipulated the electoral process in their own favor by taking steps designed to decrease the voter turnout. Eliminating the six morning hours during which the polling places were traditionally open eliminated the opportunity to vote for many commuters and other working people.

The fewer people that voted, the better chance the town politicians had of defeating the opponents of the bond issue. Low voter turnout worked in favor of the proponents of the town establishment's position because the election was structured so that voters who stayed at home and did not vote or were unable to vote because of the reduced number of polling places and reduced hours were counted as supporters of the bond-issue. The Darien Town Charter provision and the manipulation of the voting procedures in Darien had a significant impact upon the Petitioners' right to vote.

The U.S. Court of Appeals for the Second Circuit acknowledged that the 25% threshold provision "makes it more difficult for those opposed to a decision of the town's elected officials to change that decision than would be the case if only a simple majority were required." App. A at 7a. However, the court of appeals then went on to apply a "litmus-paper test" to the Darien Town Charter's 25% threshold requirement.

The "litmus test" used by the court of appeals was to classify the Darien Town Charter threshold provision as a non-discriminatory super-majority. The court of appeals held that *Gordon v. Lance*, 403 U.S. 1 (1971) (state requirement that a "super-majority" *approve* a bond issue could withstand constitutional scrutiny) compelled the decision in the case at bar in favor of the Town of Darien and its officials. App. A at 7a. *See, infra* at 17, for a discussion of the distinction between the *Gordon* super-majority which was required for affirmative government action, and the Darien Town Charter provision which placed a burden upon opponents of affirmative government action.

However, "constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "To assess the constitutionality of a state election law, [it is necessary] to first examine whether it burdens rights protected by the First and Fourteenth Amendments." *Eu v. San Francisco City Democratic Central Comm.*, 109 S. Ct. 1013, 1019 (1989). The courts below failed to fully examine the burdens imposed on the Petitioners' fourteenth amendment rights.

It is beyond debate that voting is a fundamental right protected by the Constitution. *Celebrezze*, 460 U.S. at 788. This Court has acted on numerous occasions to protect that right. *See, e.g., Board of Estimate of City of New York v. Morris*, 109 S. Ct. 1433 (1989); *Illinois State Bd. of Elections v. Socialist Workers' Party*, 440 U.S. 173,

184 (1979); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).[1]

While it was not necessary for the Town of Darien to have a charter provision to permit referenda on bond issues, having decided to confer the right, the town was obligated to do so in a manner consistent with the Constitution. *Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988). Once the government authorizes popular elections "there is no way by which equality of voting power may be evaded." *Hadley v. Junior College District of Metropolitan Kansas City, Mo.*, 397 U.S. 50, 59 (1970).

In addition to failing to scrutinize carefully the Town Charter provision, the district court and court of appeals improperly dismissed Petitioners' claims involving the vote manipulation by the town officials. The courts held that the Petitioners did not put forth evidence that the sharp reduction in the number of polling places and in the voting hours prevented anyone from voting. App. A at 8a-9a; App. B at 21a. However, the decision of the district court was on a summary judgment motion. In a summary judgment, all reasonable inferences should be drawn from the evidence put forth by the non-moving party. *Matsushita Electric Industries Co. v. Zenith Radio*, 475 U.S. 574 (1986).

Certainly the evidence of the reduced number of polling places, the reduced hours of voting, and the evidence that in prior elections the majority of votes were

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[1]The fact that the election was a referendum rather than an election of candidates does not affect the constitutional scrutiny that must be applied to a vote dilution case. The right to vote in a public referendum is fundamental and its denial is justifiable only if a compelling state interest was promoted. *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

cast prior to the hours that the single poll was open in the bond referendum is sufficient evidence to support Petitioners' claims. At least for purposes of analyzing the summary judgment motion, the courts below should have inferred from the evidence presented by the Petitioners that voter turnout was affected by the reductions.

This Court should review the decision of the court of appeals because "any infringement upon the right to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

B. The Lower Court's Decision Conflicts With Decisions of This Court Concerning the Equal Protection Clause of the Constitution.

The court of appeals' decision is in conflict with this Court's decisions concerning the equal protection clause of the Constitution. The equal protection clause subjects legislative[2] classifications of groups of people to constitutional scrutiny. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942).

In analyzing whether a legislative classification violates the equal protection clause, this Court looks at "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn*, 405 U.S. at 335. In applying those

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[2] The equal protection clause of the fourteenth amendment applies equally to the town of Darien as it does to states. *Board of Estimate of the City of New York v. Morris*, 109 S. Ct. 1433 (1989); *Avery v. Midland County*, 390 U.S. 474, 479 (1968) ("the equal protection clause reaches the exercise of state power however manifested, whether exercised directly or through municipal subdivisions of the state").

criteria it is clear that the Darien Town Charter creates a legislative classification that this Court should review to determine its impact upon the constitutional rights of Petitioners.

This Court has struck down a large number of voter classifications where voters have been unconstitutionally subject to special election requirements. *Hunter v. Erickson*, 393 U.S. 385 (1969) (proponents of fair housing legislation subject to special referendum requirements); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (denial of vote to people without property); *Gray v. Sanders*, 372 U.S. 368 (1972) (diluted weight to votes in one county compared to another); *Carrington v. Rash*, 380 U.S. 89 (1965) (denial of vote based upon military status); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (denial of right to vote based upon race).

The common theme that unites all of the above classifications that this Court has found to be unconstitutional is that each involves groups of people who are outside the government power structure. In each, the government power structure is denying the right to vote to citizens on the outside or preventing those citizens outside the political establishment from effectively using their right to vote.

In addition to the above classifications, this Court has made it clear that state action making more difficult the victory of one of the two candidates may impair the right to vote. *Williams*, 393 U.S. at 37. State and local governments also may not discriminate "against those voters whose political preferences lie outside the existing political parties." *Celebrezze*, 460 U.S. at 794. Furthermore, state and local governments "may not act to maintain the 'status quo' by making it virtually impossible for any but the two major parties to achieve positions for

the candidates." *Clements v. Fashing* 457 U.S. 957, 965 (1982).

By requiring a 25% threshold of registered voters only in elections in which the policies of government officials are challenged, the Town of Darien has created a disfavored class of voters composed of opponents of the "status quo." In *Celebrezze*, this Court recognized the supporters of an independent candidate as a class of "an identifiable segment of .... independent voters." 460 U.S. at 792. The Petitioners are also in a class of an identifiable segment of independent voters -- the opponents of "city hall."

The special burdens placed upon that class of Darien voters alone are sufficient to warrant close constitutional scrutiny. But the town officials, unsatisfied with that restriction on voters who oppose "city hall," further diluted the votes of the Petitioners by manipulating the electoral process. The reduction of the number of polling places to just one and the sharp reduction in the hours that the single polling place was open further eroded Petitioners' right to vote. Finally, the elimination of the crucial 6:00 a.m. to 12:00 noon voting hours destroyed any chance Petitioners would have had of a fair opportunity to win the referendum. The combination of multiple burdens placed upon the Petitioners' fundamental right to vote made it crystal clear that the Petitioners were being discriminated against because they were an identifiable class of independent voters.

Ignoring the burdens placed upon the Petitioners' constitutional rights, both the district court and the court of appeals in this case relied upon this Court's holding in *Gordon* in ruling against the Petitioners. App. A at 7a; App. B at 16a-17a. In *Gordon*, this Court upheld the constitutionality of electoral provisions which require

super-majorities in order to enact a bond in a referendum. Petitioners do not dispute the fact that super-majorities are constitutionally permissible. Petitioners do not seek to have this Court review *Gordon*.

However, the rule of law set forth by this Court in *Gordon* differs from the legal issue in this case. In fact, *Gordon* supports Petitioners' claim. The super-majority provision upheld in *Gordon* did not single out an identifiable group or category for discriminatory treatment; the referendum provision of the Darien Town Charter does. This Court, in deciding *Gordon*, distinguished it from *Hunter v. Erickson*, 393 U.S. 385 (1969) (striking down, under the equal protection clause, a municipal ordinance in which fair housing legislation alone was subject to an automatic referendum requirement). This case is more like *Hunter* than *Gordon*. As in *Hunter*, the Darien Town Charter imposes a special election requirement only upon elections in which the policies of the political establishment are challenged.

In *Gordon*, this Court held that the super-majority provision at issue in that case "singles out no 'discrete and insular minority' for special treatment," *Gordon*, 403 U.S. at 5. However, in the case at bar there is an identifiable group or category that is singled out as a 'discrete and insular minority' for special treatment. That group is those residents that oppose "city hall." The only elections that trigger the 25% threshold level are those that involve attempts to overturn decisions of the government officials. The class singled out are those voters who oppose the actions of the entrenched politicians.

This Court went on to hold in *Gordon* that "we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may

be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* at 5. Just the opposite occurred in Darien, however, as the opponents of city hall had their votes diluted and were fenced out of the political process solely because of the way they voted.

While a state may create a classification that burdens identifiable classes of voters, it must demonstrate a compelling state interest that would justify such a classification. Furthermore, even though local government has "broad power to regulate the time, place, and manner of elections, [that power] 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu*, 109 S. Ct. at 1019.

The government must show a "'compelling interest' which justifies imposing such heavy burdens on the right to vote." *Williams*, 393 U.S. at 31. Furthermore, the government must put forth specific interests to justify any infringement upon rights protected by the fourteenth amendment. *Celebrezze*, 460 U.S. at 789.

The Town of Darien has no compelling interest that justifies imposing a 25% threshold level of votes only in elections in which the citizens seek to overturn decisions of the town government officials. Moreover, the town has no interest that justifies reducing the number of polling places and the hours of voting in an election in which voter turnout was the key factor that decided the outcome of the election.

The district court found a "legitimate governmental interest in adopting referendum procedures that will prevent the rejection of a considered decision of the Town [government] by a faction of electors too few in number adequately to present the best interests of other town

residents." App. B at 16a (quoting *Whalen v. Heimann*, 373 F. Supp. 353 (D. Conn. 1974)). However, the 25% threshold requirement does not guarantee that a minority of the population voting in a referendum would overrule and control a majoritarian representative government.

There is no minimum number of votes that members of the town government -- whether the Board of Selectmen or the Representative Town Meeting members -- must achieve in order to be elected. There is no reason to suppose that those elected representatives received a majority of the votes of registered voters. The 25% threshold requirement would only serve to ensure that a minority of the voters cannot override the wishes of a majority-elected government if the 25% threshold requirement also applied to elections for Darien town offices.

Furthermore, no legitimate interest that the Town of Darien might have in political stability supports the "25% provision" of the town charter. Section 58 (a) of the Darien Town Charter, not challenged by Petitioners, ensures a popular level of support prior to the referendum. In order to obtain a referendum challenging a decision of the town government officials in the first place, Section 58(a) requires the opponents of the governing politicians to get 5% of the town's registered voters to sign a petition to call an election. The requirement that 5% of the voters sign a petition in order to have a referendum adequately assures that there is sufficient popular interest in an initiative to place it on the ballot. *See Meyer v. Grant*, 108 S. Ct. at 1894.

Only three referenda have been held since the town charter was adopted in 1951. App. A at 4a. The limited number of referenda highlight the fact that referenda do not threaten the stability of representative government in Darien thereby requiring a 25% threshold vote level.

Furthermore, the requirement that a majority of the voters vote "no" in order to overturn a decision of the town government officials provides an adequate safeguard to satisfy any legitimate interest the town might have in promoting political stability.

The state's interest in supporting a super-majority in *Gordon* does not apply to this case. This Court in *Gordon* upheld a super-majority in a bond election, pointing out that the state has a legitimate interest in requiring a super-majority in a bond referendum because "in voting *to issue* bonds voters are committing, in part, the credit of infants and of generations yet unborn." *Id.* at 6 (emphasis added). The Darien Town Charter provision, however, makes the indebtedness of future generations more likely by diluting the votes of citizens who wish to *defeat* bond issues.

The history of super-majority provisions in election laws demonstrates that the motivating force behind those provisions was a desire of the voters to put a check or safeguard on local government borrowing. *See* Lacy and Martin, *The Extraordinary Majority: The Supreme Court's Retreat from Voting Equity*, 10 Cal. W.L. Rev. 551 (1974). In contrast, the Darien referendum's 25% vote requirement weakens the referendum as a check or safeguard on local government borrowing.

Furthermore, under a typical super-majority requirement -- such as that upheld in *Gordon* -- the minority is not able to take affirmative action but is merely able to block the majority. The Darien Town Charter, however, permits a minority -- the voters who supported the town's decision -- to commit the majority of voters to taking the affirmative action of placing the town's citizens and subsequent generations in debt. Blocking action by a minority group is not minority rule. *See* J. Buchanan &

G. Tullok, *The Calculus of Consent* 258-60 (1962). However, permitting a minority to take affirmative government action is truly minority rule -- a system anathema to the democratic process. In short, the Darien Town Charter permits minority rule by preventing a majority of voters from stopping the town government from taking affirmative government action -- the issuance of bonds.

It is clear that the Town of Darien has created a legislative classification that impacts upon Petitioners' fundamental right to vote. The decision of the court of appeals in finding that classification to be non-discriminatory and constitutionally permissible is in conflict with the decisions of this Court that government officials cannot use the electoral process to "fence out" those outside the mainstream of political power structures. The "fencing out" in this case was particularly egregious because it was a majority of the voters that was fenced out.

CONCLUSION

The right to vote is a fundamental right. Furthermore, the decision of the U.S. Court of Appeals for the Second Circuit is in conflict with numerous decisions of this Court which protect that right. An erroneous precedent has been set which misapplies the applicable decisions of this Court. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

March 1, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 668 - August Term 1990
(Argued November 21, 1990 Decided March 1, 1991)
Docket No. 90-7660

JOELLYN GRAY, CHRISTOPHER M. SMITH, MALCOLM HALL, JR., BEEKMAN V. BEAVERS, ELIZABETH B. JONES, FRANK CONANT, DAVID E. ERB, JOHN L. GOODALL, ALBERT J. DURYEA, PEGGY J. STEPHENS, JOHN D. STEPHENS,

Plaintiffs-Appellants,

v.

THE TOWN OF DARIEN, the Board of Selectmen, Board of Finance and other Boards and Commissioners, acting singly or in concert, in whole or in part, together with all officers, employees, agents and attorneys thereof,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, WALKER, *Circuit Judges*,
and LEVAL, *District Judge**

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*The Hon. Pierre N. Leval, United States District Judge, Southern District of New York, sitting by designation.

Appeal from an order of summary judgment entered in the United States District Court for the District of Connecticut (T.F. Gilroy Daly, *Judge*) dismissing plaintiffs' complaint against the Town of Darien and various of its officials.

Affirmed.

WILLIAM P. JONES, Darien, CT, for *Plaintiffs-Appellants*.

WILLIAM B. RUSH, Bridgeport, CT, (James T. Shearin, Pullman, Comley, Bradley & Reeves, of Counsel) for *Defendants-Appellees*.

WALKER, *Circuit Judge*:

Plaintiffs, who are citizens of the Town of Darien, Connecticut, appeal from an order of summary judgment of the United States District Court for the District of Connecticut (T.F. Gilroy Daly, Judge) dismissing their complaint against the town and various of its officials. The complaint seeks to nullify the result of a town-wide referendum that failed to overturn the decision of the Representative's Town Meeting to issue $2 million in bonds to finance moderate rental housing. The first cause of action alleges that plaintiffs were denied equal protection of the laws by the town charter's requirement that a referendum vote to overturn a town decision must be supported by at least 25% of all eligible voters. The second cause of action alleges that by limiting the polling places and voting hours for the referendum, by issuing a complex referendum notice and by preventing plaintiffs from distributing flyers, defendants conspired to deprive plaintiffs of their civil rights and voting rights under 42

U.S.C. §§ 1983 and 1985(3). Because we hold the 25% majority referendum provision in the town charter to be constitutional and conclude that the district court did not err in finding that plaintiff's failed to produce any evidence of injury caused by the alleged conspiracy, we affirm.

Background

On December 12, 1988, at a regular meeting of Darien's Representative Town Meeting (Town Meeting), the legislative body approved an appropriation of $2 million, to be funded by a bond issue, for the purchase of a land parcel for moderate rental housing. Those opposed to the Town Meeting's action successfully petitioned for a town-wide referendum vote on the proposed transaction to be held on February 7, 1989. Pursuant to Darien's town charter those voting to overturn an action of the Town Meeting in a referendum must win a majority of the votes cast and must exceed 25% of all of the town's electors as of the last annual municipal election in order to prevail.

On February 6, 1989, the day before the referendum, plaintiff Joellyn Gray was distributing leaflets at the Darien train station encouraging electors to vote in opposition to the referendum when she was stopped by two police officers, one of whom testified that citizens had complained in the past that leaflets placed on car windshields caused litter. She was neither arrested nor issued a citation. The testifying officer denied knowledge of the contents of the leaflets and said he was following his normal policy and procedure.

On February 7, 1989, the town held the referendum vote. The Town's Board of Selectman fixed the time for the polls to be open from 12:00 noon to 8:00 p.m. and

designated the Darien Town Hall as the only place for voting. Since 1951, when Darien was first chartered, three previous referenda had been held. In referenda held in 1957 and 1958, three polling places were designated corresponding to the town's three districts. In a 1972 referendum, six polling places corresponding to the town's six districts were utilized. In each case the polls were open from 6:00 a.m. to 8:00 p.m. The record indicates that in the 1988 general election, when six polling places were also open from 6:00 a.m. to 8:00 p.m., two of the six were located together in the Darien Town Hall that had been constructed in 1984. The record also indicates that for the referendum vote at issue here at least twelve voting machines -- two for each of Darien's six districts -- were located in the single Town Hall polling place and that notices referring voters to the Town Hall were placed at the four unused polling places.

The question posed in the February 7, 1989 referendum was the following:

> Shall the following action of a town meeting held on December 12, 1988 be approved: Resolution approving an appropriation and bond authorization of $2,000,000 for the purchase of the Prindle Hopkins property on the northeast corner of Leroy Avenue and Squab Lane to be used for moderate rental housing?

Since the "No" votes fell 262 votes short of 25% of the registered voters, the town selectmen announced that they would proceed with the purchase of the property.

Proceedings in the District Court

The plaintiffs filed their complaint on March 16, 1989, and on April 6, 1989, following a hearing, the district court denied plaintiffs' motion for a preliminary injunction. On May 24, 1989, the town took title to the land.

The defendants answered and, pursuant to a scheduling order under Fed. R. Civ. P. 16(e) that permitted recovery during the six months after the filing of the complaint, the defendants completed discovery. On October 11, 1989, defendants filed a motion for summary judgment.

Plaintiffs sought no discovery until they noticed depositions on November 22, 1989. On November 30, plaintiffs opposed defendants' summary judgment motion and cross-moved for summary judgment on the first count of the complaint. Defendants also moved for a protective order since plaintiffs had failed to seek recovery during the six month period allowed by the scheduling order or to move for an extension. On December 5, 1989, the district court granted defendants a protective order precluding further discovery by plaintiffs. On January 2, 1990, the district court denied plaintiffs' motion to reopen and extend the time of discovery finding that plaintiffs had failed to demonstrate good cause for granting the motion.

On June 29, 1990, the district court granted summary judgment for defendants, denied summary judgment for plaintiffs and dismissed the complaint. This appeal followed.

Discussion

Plaintiffs claim that Darien's "super majority" provision for referendum votes overturning actions of the Town Meeting denied them equal protection secured by the Fourteenth Amendment. Section 58(e) of the Darien Town Charter provides:

> Any action so submitted to a special electors' meeting shall stand approved unless a majority of those voting thereon shall have voted "No" and such majority shall exceed in number twenty-five per cent of all the electors of the Town as of the last annual municipal election.

Plaintiffs argue that their "landslide" victory in opposition to the town's moderate rental housing land purchase bond issue of 2,334 "No" votes to 1,508 "Yes" votes was impermissibly nullified by the requirement that the number of "No" votes exceed 25% of eligible voters; plaintiffs, despite winning a majority of votes, fell 262 votes short of meeting this requirement. The "super majority" provision's effect as applied, plaintiffs contend, was to deny them "the right to an equal vote and the right not to have one's vote diluted or rendered less effective than the next man's." This, they say, amounted to a denial of equal protection of the laws under the Constitution's Fourteenth Amendment, actionable under 42 U.S.C. § 1983. In our view the district court correctly rejected this claim and thus properly dismissed plaintiffs' first cause of action.

In *Gordon v. Lance*, 403 U.S. 1 (1971), the Supreme Court found no constitutional infringement in West Virginia's state constitutional requirement that political subdivisions could not incur bonded indebtedness or increase tax rates without approval of 60% of the voters in

a referendum. The Court distinguished those cases in which the voting requirement unconstitutionally favored a class other than those who voted a particular way in an election, such as *Gray v. Sanders*, 372 U.S. 368 (1963) (according greater weight to voters of one county than another) and *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (limiting voting right in bond referendum to "property taxpayers").

While reaffirming the principle that an individual may not be denied access to the ballot because of some extraneous conditions, *see, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (race); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (tax status); *Carrington v. Rash*, 380 U.S. 89 (1965) (military status); the *Gordon* Court upheld a "three-fifths requirement applie[d] equally to all bond issues for any purpose, whether for schools, sewers, or highways." 403 U.S. at 5. The Court could find no constitutional impairment in a provision that, by altering the voting requirement, made it less likely to achieve governmental outcomes which were not targeted at any "discrete and insular minorit[ies]." *Id.*

Gordon v. Lance compels our decision in favor of the town defendants in this case. In *Gordon*, the 60% majority requirement served West Virginia's rational, non-discriminatory purpose of ensuring that tax increases and bonded indebtedness have extra public support. Neither specific projects nor classes of persons were targeted for discriminatory treatment. In this case, the Darien Town Charter's requirement that a 25% voter threshold must be met before a referendum can overturn the town's decision is similarly non-discriminatory. The fact that the provision makes it more difficult for those opposed to a decision of the town's elected officials to change that decision than would be the case if only a simple majority were required is constitutionally irrelevant. The provision

simply accords added weight to the decision of elected officials. "[T]here is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." *Id.* at 6. Indeed, there is no constitutional necessity that the town provide a referendum vote at all. Therefore, we can find no constitutional infirmity, when having provided for a referendum, the town conditions it in a non-discriminatory manner.

Plaintiffs' second claim is that the Darien Selectmen conspired to deprive plaintiffs and others who would have voted "No" at the referendum of their civil rights in contravention of 42 U.S.C. §§ 1983 and 1985(3). The complaint alleges that by confining voting to the town hall instead of using the four additional locations employed in the previous election, by limiting the voting hours from noon to 8:00 p.m. instead of 6:00 a.m. to 8:00 p.m., by issuing a purportedly confusing notice of the referendum, and by the policemen's actions in preventing plaintiffs from distributing leaflets in the station parking lot, the defendants caused a lower voter turnout resulting in the referendum's defeat.

To state a civil rights conspiracy under § 1985(3), a plaintiff must allege: 1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right to privilege of a citizen of the United States. *United Brotherhood of Carpenters & Joiners of America v. Scott*, 463 U.S. 825, 828-29 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). In applying this standard, the district court held that plaintiffs' case failed because they had proffered no evidence that they had

been deprived of a constitutional right. The court stated: "Although plaintiffs allege practices such as the reduction in polling places which theoretically might have created . . . problems . . ., they have failed to offer any evidence that any of these problems *actually* occurred. We agree with the district court.

Plaintiffs point to *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969), in which an election was overturned when a reduction in polling places resulted in overcrowding that prevented people from voting. But there is no evidence in this case that limiting polling places and voting hours had that effect. As the district court noted, plaintiffs have failed to produce a single person who claims to have been prevented from voting by these limitations. As for plaintiffs' claim that defendants prevented them from distributing leaflets that would have informed citizens about the referendum and that the three-page referendum notice was confusing, they have similarly failed to produce anyone who claims not to have voted because he or she was unaware of the purpose of the vote or the time and location of voting.

Because we dispose of plaintiffs' conspiracy claim alleged in the second cause of action on the basis that there has been no showing of a constitutional deprivation, we need not reach such issues as whether the complaint sufficiently alleged a conspiracy or concerted action or whether defendants' conduct could fairly be said to be in furtherance of an agreement improperly to inhibit voting in the referendum. We note that by holding the voting from noon to 8:00 p.m., the town was acting in accordance with Connecticut's Advisory Guidelines on municipal referenda. Moreover, there is no explicit requirement in the Guidelines that polls be open in more than one location. The referendum notice, while lengthy, provided the requisite information and was in no respect mislead-

ing. As for the actions of the Darien police in stopping the distribution of leaflets in the train station, there was no evidence that they were connected to any effort on the part of any Selectmen to influence the referendum vote, much less to a conspiracy. To the extent a free speech impairment is alleged, there is also no evidence that the actions of the police were anything other than an attempt to prevent litter by undertaking a reasonable content-neutral law enforcement action. *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

On their conspiracy claim, the plaintiffs have failed to respond to the summary judgment motion by coming forward with evidence which if credited would have entitled them to the relief sought in their complaint. In such circumstances, summary judgment should be granted under Fed. R. Civ. P. 56(c) "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Plaintiffs have failed "to make a showing sufficient to establish the existence of an element essential" to their case. *Id.*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted) (to deny summary judgment, must be "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[I]f the factual context renders respondents' [conspiracy] claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.")

In a summary judgment context, an "opposing party's mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of [a summary judgment] motion." *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981) (quoting *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 344 (9th Cir. 1978)). Plaintiffs assert that if they had been able to conduct further discovery, facts could have been developed to support their claim and that the district court abused its discretion in granting defendants' motion for a protective order that cut off discovery. However, plaintiffs only speculate as to what evidence, if any, further discovery would produce. In any event, in light of plaintiffs' failure to seek any discovery in the six months provided by the district court's scheduling order and failure to show good cause for a reopening or extension of that order, we cannot say that the district court abused its discretion in cutting off discovery and in later denying plaintiffs' motion to reopen it. *See Contemporary Mission*, 684 F.2d at 107 (not abuse of discretion to deny discovery and grant summary judgment where plaintiff fails to produce specific facts in conspiracy allegation). Thus, plaintiffs were left with only the "mere hope" that evidence might develop at trial which would breathe life into their claim. This was insufficient to overcome defendants' motion for summary judgment.

Affirmed.

APPENDIX B

Opinion and Judgment of the United States District Court for the District of Connecticut

June 29, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOELLYN GRAY, CHRISTOPHER H. SMITH, MALCOLM HALL, JR., BEEKMAN V. BEAVERS, ELIZABETH B. JONES, FRANK CONANT, DAVID E. ERB, JOHN L. GOODALL, ALBERT J. DURYEA, PEGGY J. STEPHENS, JOHN D. STEPHENS, Plaintiffs,	:	
	:	Civ. No.
v.	:	B-89-133 (TFGD)
THE TOWN OF DARIEN, THE BOARD OF SELECTMEN, BOARD OF FINANCE, AND OTHER BOARDS AND COMMISSIONERS, ACTING SINGLY OR IN CONCERT, IN WHOLE OR IN PART, TOGETHER WITH ALL OFFICERS, EMPLOYEES, AGENTS AND ATTORNEYS THEREOF, Defendants.	:	

RULING ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

BACKGROUND

The above-named plaintiffs, various qualified voters of the Town of Darien, Connecticut, filed this action on March 16, 1989, and submitted an amended complaint containing three counts on April 19, 1989. They seek various forms of injunctive relief against the Town of Darien and its officers and employees ("defendants"), and, on the third count, monetary damages against members of the Board of Selectmen and Town Counsel ("individual

defendants"). Plaintiffs claim that a referendum pursuant to the Darien Town Charter ("the Charter") deprived them of equal protection and due process under the Fourteenth Amendment, and violated the Civil Rights Act, 42 U.S.C. § 1983. Plaintiffs also claim that members of the Board of Selectmen conspired to deprive the plaintiffs of such rights, by manipulating the voting procedure so as to obtain the result they desired, all in violation of 42 U.S.C. § 1983 and 1985(3). On April 6, 1989, the Court heard oral argument on plaintiffs' application for a preliminary injunction, and denied this application in a ruling from the bench. Defendants have now moved for summary judgment on all three counts of the amended complaint. For the reasons discussed below, defendants' motion is granted.

DISCUSSION

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56 mandates the entry of summary judgment against a party who, faced with a motion for summary judgment, "fails to make a showing sufficient to establish the existence of an element essential to that party's case or claim, and on which that party would bear the burden at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The moving party, of course, has the initial responsibility of demonstrating that there are no disputed facts, and that it is entitled to judgment as a matter of law. *Id.* at 323. The Court must draw all reasonable inferences from the evidence which support the non-movant. *Diamantopolus v. Brookside Corp.*, 683 F. Supp. 322, 325 (D. Conn. 1988). If reasonable inferences

from the evidence which support the non-movant's version of an element of that party's case, then there is a material dispute and the motion must be denied. *See Celotex*, 417 U.S. at 323.

With these standards in mind, viewing the evidence in the light most favorable to the plaintiffs, the Court considers the facts as described below. On December 12, 1988, at a scheduled session of the Darien Representative Town Meeting ("RTM"), a resolution was adopted approving the appropriation of $2,000,000 to purchase land known as the Prindle-Hopkins property to be used for moderate income housing. A number of residents opposed this appropriation, and, in accordance with the provisions of the Charter, filed a petition calling for a referendum on this resolution. This referendum was scheduled for February 7, 1989. The Board of Selectmen fixed the voting time for the referendum to be from noon until 8:00 p.m., and designated the Town Hall as the only polling place for voting. Three previous referenda have been held in Darien, in 1957, 1958, and 1972. In 1958, the Selectmen designated three polling places, and in 1972, the Selectmen designated six polling places. In both of these referenda, the polls were open from 6:00 a.m. until 8:00 p.m., as they are in regular elections in the town. On February 6, 1989, the day before the referendum, two town policemen ordered two of the plaintiffs to cease placing literature on automobiles parked in the Darien railroad station parking lot.

The referendum was held on February 7, 1989, as scheduled. The question posed was

> Shall the following action of a town meeting held on December 12, 1988 be approved: Resolution approving an appropriation and bond authorization of

> $2,000,000 for the purchase of the Prindle-Hopkins property on the north-east corner of Leroy Avenue and Squab Lane to be used for moderate rental housing?

The final result of the referendum was that 1,508 residents voted in favor of the appropriation, and 2,334 voted against it. The number of registered electors in Darien at the time of the last municipal election was 10,384. Under Section 58(e) of the Charter, any resolution adopted at a Town Meeting, such as the resolution at issue, "shall stand approved unless a majority of those voting shall have voted 'No' and such majority shall exceed in number twenty-five percent of all the electors of the town as of the last annual municipal election." The "No" votes thus fell 262 votes short of twenty-five percent of the registered voters, and the Selectmen announced that they would proceed with the purchase of the property. The Town took title to the land on May 25, 1989.

(a) Count One

Plaintiffs' first cause of action recites that section 58(e) of the Charter, the "supermajority" provision, abridges their privileges as citizens of the United States, and denies them equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Furthermore, plaintiffs claim in their first cause of action that, as these deprivations are pursuant to the Charter, and thus, under color of law, such actions violate Title 42 of United States Code, section 1983. These claims are based upon several theories, including, though not specifically stated, that the Fourteenth Amendment requires the outcomes of such referenda to yield to the votes of the majority.

As the parties agree as to the facts material to this claim, and only questions of law remain, the matter is ripe for summary judgment. The Court finds Judge Newman's decision in *Whalen v. Heimann*, 373 F. Supp. 353 (D. Conn. 1974), to be highly persuasive on the legal issues presented in this cause of action. In that case, the Court considered a provision which required that the majority necessary to overrule a town board decision must be at least twenty percent of the electors registered on the last voting list. Although the Court was primarily confronted with the effect of absentee ballots on the supermajority provision there encountered, the Court expressly wrote that "[t]he Town of Trumbull has an obviously legitimate governmental interest in adopting referendum procedures that will prevent the rejection of a considered decision of the Town Council by a faction of electors too few in number adequately to present the best interests of other town residents." *Id.* at 358. The Town of Darien, of course, shares such an interest.

As the defendants correctly point out, the Supreme Court has considered and rejected a challenge to a content-neutral supermajority provision in the face of arguments similar to those plaintiffs here advance. In *Gordon v. Lance*, 403 U.S. 1 (1971), the Court upheld the constitutionality of a sixty-percent requirement imposed by the West Virginia Constitution and statutes as a predicate to any act increasing a political subdivision's public debt. There, despite a majority of local voters' support for the action of a board of education, the proposal could not effectuated because of a failure to achieve the agreement of the requisite supermajority. *Id.* Although the voting percentages in that case were determined by looking to total votes cast, rather than the number of registered voters, the reasoning of the Court is helpful in this case.

The Court explicitly wrote that "there is nothing in the language of the Constitution, our history, or in our cases that requires that a majority always prevail . . . ." *Id.* at 6. As plaintiffs point out in attempting to limit the *Gordon* holding, the Court specifically noted that a decision to take on indebtedness commits the credit of future generations, and, therefore, some restriction on such a commitment is not an unreasonable demand. *Id.* Rather than distinguishing *Gordon* from the present case, however, this argument supports the application of Darien's supermajority provision in this instance, where the issue is whether to appropriate public funds for a public project. In any event, the *Gordon* Court explained that, when evaluating supermajority provisions, as long as such provisions do not discriminate against any identifiable class they are not violative of the Equal Protection Clause. *Id.* at 7. Here, even more so than the case in *Gordon*, the supermajority provision of the Darien Charter is content neutral, directed blindly at those who oppose any resolution adopted by the Town's duly-elected representatives. Thus, plaintiffs' implicit suggestion that any outcome other than that dictated by strict majority-rule unconstitutionally denigrates their voting power is without merit.

Plaintiffs' remaining arguments on this cause of action are also unavailing. Plaintiffs correctly note that in those cases where courts considered and upheld supermajority provisions [other than *Whalen*], the supermajority provision prevented the local government from effectuating a course of action the majority desired. *See, e.g., Gordon*, 403 U.S. at 1. Here, of course, the supermajority provision allows the local government to pursue a course of action opposed by the majority of residents who voted in the referendum. The Court first notes that plaintiffs have cited no authority for the suggestion that this distinction is of constitutional importance. More

significantly, the *Whalen* Court considered a supermajority provision which operated to "uphold" an appropriation against a majority of those voting. *Whalen*, 373 F. Supp. at 353. As discussed, the Court indicated that such a provision was constitutional. *Id.* Finally, the Court fails to see the relevance of plaintiffs' contentions concerning the doctrine of "one man, one vote." The cases plaintiffs cite hold that the Constitution demands equal representation, an issue not before the Court. *See New York City Board of Estimate v. Morris*, ___ U.S. ___, 109 S.Ct. 1433 (1989). Accordingly, the plaintiffs have failed to demonstrate that the supermajority provision of Darien's Town Charter is unconstitutional and the defendants' motion for summary judgment on count one is granted.

(b) Count Two

Plaintiffs' second cause of action recites that two or more members of the Board of Selectmen conspired to deny the plaintiffs and that class of persons who voted "No" in the referendum of February 7, 1989 equal protection of the laws and from exercising their voting rights, in violation of Title 42 of the United States Code, section 1985(3). Specifically, plaintiffs claim that actions taken by the Selectmen in running the referendum evince this conspiracy, such as keeping the polling location open for a period of time shorter than in past referenda and normal elections, and having one polling place for voters to cast ballots, instead of the usual six.

To state a civil rights conspiracy claim under section 1985(3) the plaintiff must allege "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and, (4) whereby a person is either injured in his person or prop-

erty or deprived of any right or privilege of a citizen of the United States." *United Brotherhood of Carpenters & Joiners of America v. Scott*, 463 U.S. 825, 828-29 (1983); *see also Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 586-87 (2d Cir. 1988).

The Court first turns to an examination of the evidence concerning the final element of such a claim: injury, or deprivation of a federal right or privilege. Plaintiffs claim no particular injury to their persons or property. Standing by itself, of course, the unfavorable result in the February 7, 1989 referendum is not a cognizable injury. Plaintiffs, however, do claim a deprivation of a federal right. They allege that the election was conducted in a manner so as to discourage registered voters from casting their ballots, and so as to deprive individuals of the opportunity to vote against the appropriation. Plaintiffs' theory continues that as a result, by virtue of the supermajority provision, defendants' actions constructively deprived plaintiffs' votes of weight equal to those in favor of the referendum. The Court notes that plaintiffs do not contend that the procedures which were adopted for the referendum were specifically violative of either state or local law.

The uncontested evidence indicates that, unlike two prior referenda (one in 1972, and one in 1958) and normal elections, only one polling place was open for this vote. Furthermore, this polling place was only open from noon until 8:00 p.m., unlike the other referenda, where the polls were open from 6:00 a.m. until 8:00 p.m.[1] Plain-

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[1]On April 25, 1988, the Town Clerk's Office of Darien received Advisory Guidelines from the Office of the Secretary of State. Section One of these guidelines describes that nothing in the Connecticut General Statutes requires the use of the same polling places in a (continued...)

tiffs contend that due to these changes in the conduct of the referendum, as well as other actions defendants took independent of the voting procedures, "voters stayed away in droves," making the supermajority provision more likely to go unmet. Pltf's Mem. at 20. For clarity's sake, the Court notes that no plaintiff claims to have been actually deprived of the ability to vote.

Plaintiff places greatest reliance on *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969), for the proposition that a complaint claiming that election procedures which deny voters an effective vote states an actionable deprivation of a federal right. There, the Court found that on election day qualified voters were forced to wait unreasonable lengths of time to obtain and cast their ballots as a result of the consolidation of thirty-two precincts into six precincts, and because of insufficient numbers of judges manning the polling places. *Id.* at 124. Many who succeeded in casting their ballots had to mark them outside the polling booths. *Id.* Furthermore, the Court found that the precincts were "grossly unequal" in the number of voters which they contained. *Id.* As a result, many voters in certain precincts were forced to wait for periods of two to four hours to cast their ballots, and traffic jams arose at certain precincts requiring the police to direct voters away from the polling places. *Id.* at 124. The Court found that such inequality seriously prejudiced the voters residing in more populous precincts. *Id.* at 125. All in all, the *Ury* Court found that the defendants, individual members of the local government responsible for

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[1](...continued)
referendum as in an election, and municipalities are free to choose fewer polling places. Furthermore, the Guidelines note that Section 7-9b of the Connecticut General Statutes provide that normal voting hours are from noon until 8:00 p.m., though the hour of opening should remain flexible depending upon the circumstances. The Plaintiffs offered this evidence.

running the election, deprived plaintiffs of their constitutional right to a reasonable opportunity to vote in local elections, including reasonable access to the voting place, and a reasonable amount of time to vote within a private and enclosed space. *Id.* at 126. The Court concluded that, in view of the substantial number of voters who were unable to cast their ballots, and the disparity in the effect of such problems, the election results were rendered doubtful. *Id.* For all of these reasons, the Court found a deprivation of the plaintiffs' constitutionally protected voting rights. *Id.*

Although plaintiffs allege practices such as the reduction in polling places which theoretically might have created some of the problems encountered in *Ury*, they have failed to offer any evidence that any of these problems *actually* occurred.[2] Plaintiffs have not offered evidence of a single individual who was prevented from voting due to the reduced hours the polling location was open. Nor have they offered any evidence that this location was so crowded that lines formed so as to delay unreasonably any voter in his or her effort to exercise the right to vote. Indeed, plaintiffs candidly admit that 37 percent of the registered voters cast ballots in the referendum. Although 63 percent voted in the 1958 referendum, with three polls open, only 39.9 percent voted in 1972, with six polls open. Thus, plaintiffs have offered no evidence that defendants' actions deprived any voter of a reasonable opportunity to vote, or reasonable access to the voting place, or a reasonable amount of time to vote

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[2] At one point in their brief plaintiffs blithely assert that all they need show is evidence of defendants' practices which could have affected the results of the election. Plaintiffs offer no support for this contention. Since the question posed by the fourth element of this claim is whether plaintiffs suffered a deprivation, plaintiffs, in opposing summary judgment, must come forth with some evidence of a deprivation. *See Celotex*, 477 U.S. at 322.

within a private and enclosed space. *Ury*, 303 F. Supp. at 126. Indeed, plaintiffs have failed to offer evidence that any of defendants' actions caused potential voters to stay away at all. Accordingly, plaintiffs have failed to offer evidence from which a reasonable jury could infer that defendants' actions deprived them of federal rights.

As plaintiffs have not sufficiently demonstrated the requisite injury, or deprivation of a federal right, they cannot satisfy a necessary element of a § 1985(3) claim. Accordingly, such a claim cannot succeed, and the Court need not examine the evidence concerning the other elements. As there are no genuine disputes of material facts, and as defendants are entitled to judgment as a matter of law, summary judgment is appropriate against plaintiffs on their second cause of action as well.

The Court additionally notes that one of the practices plaintiffs ascribe to defendants' scheme is that, in furtherance of the conspiracy, local police prevented plaintiffs from distributing literature to potential voters in violation of the First and Fourteenth Amendments. Although plaintiffs include this as an example of practices which may have kept voters away,[3] such allegations state a claim for a constitutional deprivation itself. Even this claim does not save plaintiffs' second cause of action from summary judgment, however, because plaintiffs have failed to produce any evidence linking this action to any conspiracy on the part of defendants. Mrs. Gray's testimony that, when stopped from distributing literature by the policemen in the parking lot, one policeman said to the other "Oh, you found them," even when read generously, hardly constitutes evidence of a scheme to deprive plaintiffs of their

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[3]Of course, even if plaintiffs have included this claim for such a purpose it is unavailing, since they failed to produce evidence that such actions kept voters away.

First Amendment rights. Thus, although as to this claim plaintiffs have perhaps produced evidence of a deprivation, they have failed to produce evidence of any conspiracy, the first element of a 1985(3) claim. Accordingly, this claim does not save plaintiffs' second count from summary judgment.

Finally, plaintiffs' third cause of action simply seeks to hold the individual members of the Board of Selectmen and Town Council individually liable for any expenditures made in connection with the property, assuming that the referendum is held unlawful. As plaintiffs' legal claims are without merit, this third cause of action is similarly hollow.

CONCLUSION

For all of the foregoing reasons, defendants' motion for summary judgment as to all three counts of plaintiffs' complaint is GRANTED. Accordingly, plaintiffs' complaint is hereby DISMISSED.

SO ORDERED.

Dated at Bridgeport, Connecticut this 29th day of June, 1990.

/s/ T. F. Gilroy Daly
T. F. Gilroy Daly, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOELLYN GRAY, et al.

v. CIVIL NO. B-89-133 (TFGD)

TOWN OF DARIEN, et al.

JUDGMENT

This cause came on for consideration on the defendants' motion for summary judgment before the Honorable T. F. Gilroy Daly, United States District Judge, and

The Court having considered the motion and all the papers submitted in connection therewith filed its Ruling on Defendants' Motion For Summary Judgment granting the motion and further ordered that the plaintiffs' complaint be dismissed,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the defendants and the plaintiffs' complaint is dismissed.

Dated at Bridgeport, Connecticut this 29th day of June, 1990.

By /s/ Carol E. Cannady
Carol E. Cannady
Deputy in Charge

APPENDIX C

Exhibit L to Connant Affidavit in U.S. District Court

Town of Darien, Minute Book, Vol. 16, page 902

VOTER TURNOUT

	ELIGIBLE	VOTED
Registered Voters	11,700	10,461
Presidential Voters	73	73
Overseas Voters	19	19

National Election

11/8/88

	7 am	8 am	9 am	10 am	11 am	12 n	1 pm	2 pm	3 pm	4 pm	5 pm	6 pm	7 pm	Mach. Total 8 pm	A.B. Total	Reg. Voting Total	Pres.	Over.	P+O Total	Grand Total Voting
D 1	121	269	411	541	669	784	862	929	1010	1104	1198	1315	1428	1486	257	1,743	9	0	9	1,752
D 2	97	252	409	543	668	781	869	948	1032	1130	1230	1349	1465	1533	240	1,773	15	7	22	1,795
D 3	99	222	380	539	669	793	886	996	1080	1177	1272	1409	1513	1581	234	1,815	15	1	16	1,831
D 4	79	218	338	469	568	753	729	819	870	970	1052	1175	1320	1373	189	1,562	10	5	15	1,577
D 5	109	249	401	542	671	810	889	978	1061	1132	1246	1346	1469	1543	250	1,793	14	3	17	1,810
D 6	108	253	389	511	650	740	824	924	1001	1095	1205	1325	1477	1580	195	1,775	10	3	13	1,788
Total	613	1463	2328	3145	3895	4561	5059	5594	6054	6608	7203	7919	8672	9096	1365	10,461	73	19	92	10,553
%	5.2	12.5	19.9	26.9	33.3	39.0	43.2	47.8	51.7	56.5	61.6	67.7	74.1	77.7	11.7	89.4				89.4

Town of Darien Minute Book, Vol. 16, page 902

(2)

No. 91-23

Supreme Court, U.S.
FILED
AUG 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOELLYN GRAY, *et al.*,

Petitioners,

—v.—

THE TOWN OF DARIEN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MITCHELL A. KARLAN
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Attorneys for Respondents

STATEMENT OF QUESTION PRESENTED

Does a municipality deny its citizens equal protection of the laws in violation of the Fourteenth Amendment when it gives its citizens a right to veto, by simple majority vote at a special referendum, resolutions of the municipality's elected officials, but requires that such a veto be supported by at least one-fourth of the town's registered voters?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-23

JOELLYN GRAY, *et al.*,

Petitioners,

—v.—

THE TOWN OF DARIEN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Petition provides no basis for review by this Court. The ruling below is not in conflict with any ruling from this or any other federal court. No novel or unresolved question is presented. Indeed, all four federal judges who have reviewed this matter have concluded that one of this Court's prior cases compels judgment for respondents; yet petitioners expressly disavow any desire for this Court to overturn or revisit that case. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

The District Court granted respondents' motion for summary judgment dismissing the complaint after the close of discovery, and the Court of Appeals unanimously affirmed. Both courts rejected petitioners' claim that a municipal ordinance granting citizens a right to veto actions of the town's legislature violated the Equal Protection Clause. Both courts concluded that the ordinance is facially neutral and has no predictable impact upon any identifiable, fixed group. The petitioners thus failed to establish the elementary precondition of an Equal Protection claim: state action that treats similarly situated persons differently. The ordinance does not deny any person any fundamental right (or any right whatever) and serves important, legitimate state interests.

A. Darien's Town Government.

The Charter of Darien, Connecticut delegates the Town's legislative power to a Representative Town Meeting ("RTM"),[1] which the Charter provides shall have one member for every 100 registered voters, but in no event more than 100 members. The RTM currently has one member for every 103 registered voters.[2] RTM members serve for only two years; half the members stand for reelection each year. They do not run as members of political parties and, if elected, may not hold any other Town office. All members serve without compensation.[3]

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1 Under Connecticut law, municipal corporations may choose to conduct town business in a traditional town meeting, where all adult residents physically gather and vote on propositions, or by a Representative Town Meeting, in which the legislative power of the town is delegated to elected officials. Conn. Gen. Stat. § 7-193.

2 By comparison, the Connecticut House of Representatives has one member for every 11,079 registered voters and the Connecticut delegation to the U.S. House of Representatives has one member for every 278,824 registered voters.

3 Charter of Town of Darien §§ 48, 49, 50, 51, 52, 53.

The RTM acts by simple majority vote, provided however that a quorum is present consisting of a majority of all members. Thus, no measure can pass the RTM without the affirmative vote of more than 25% of its members.[4]

In addition, the Town's voters elect a five-member Board of Selectmen, which administers all Town agencies and constitutes the Town's executive branch, and a seven-member Board of Finance, which must approve all expenditures of Town funds. Members of the Board of Selectmen serve two-year terms; Finance Board members serve four-year terms, with half the Board standing for election every two years. Under the Town Charter and Connecticut law, no political party can ever have more than a bare majority of the membership of the Board of Selectmen or more than five of the seven seats on the Board of Finance. All members of the Board of Selectmen except the First Selectman receive only nominal compensation of $1,000. Finance Board members serve without compensation. Both Boards have quorum requirements similar to those for the RTM.[5]

Interest in local elections is keen. In November 1989, 65% of the Town's registered voters turned out to elect the Board of Selectmen, half the Board of Finance, and half the RTM. Competition for these positions is intense. None of the Selectmen who held office in March 1989 when this action was commenced remains on the Board today. In the last four elections for First Selectman, each major party has won twice.

B. The Town Action At Issue.

In 1988, two Darien families, the Prindles and the Hopkins, offered to sell the Town their adjoining homes and property, which together constituted a 2.29-acre parcel adjacent to the Town's central shopping district and commuter railroad station. Town officials expressed interest because the Town had for many years been formally studying the devel-

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4 *Id.* § 56.

5 *Id.* §§ 4, 10, 13, 14, 15, 20, 22; Conn. Gen. Stat. § 9-167a.

opment of moderately priced rental housing for Town employees and the Town's elderly population.

The Boards of Finance and Selectmen each unanimously approved a $2 million bond issue to purchase the property, and the Town's Planning and Zoning Commission unanimously approved the land acquisition. The RTM then voted on December 12, 1988 to issue the bonds and buy the land. The RTM vote was 73 to 13 (thus, 73% of all RTM members and 85% of those voting voted in favor of the purchase). Each of the four bodies voted at a separate public meeting. Articles announcing and reporting on these public meetings appeared in the local weekly and daily newspapers. The RTM vote followed formal debate at which all registered voters could speak concerning the proposal. The lead petitioner in this action, although not an RTM member, spoke at the public meeting before the vote.

C. The Veto Referendum.

Following the RTM vote, 666 registered voters (6% of the total) petitioned for a referendum on the bond issue pursuant to Section 58 of the Town Charter, which, as a further check on government power, gives a veto to any simple majority constituting at least 25% of the Town's registered voters. Section 58 may be invoked to veto any ordinance on any subject, or any appropriation of more than $50,000. All adult residents are eligible to register to vote in the veto referendum; all voters receive one vote; all votes are counted equally; the votes are tallied on a townwide basis.[6]

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6 Section 58 provides in relevant part as follows:

(a) Any action of the town meeting . . . shall be subject to overrule as follows: If a petition . . . signed by . . . not less than five percent of the electors . . . is filed . . . requesting that the action be referred to a vote of all the electors of the town, the board of selectmen shall promptly call a *special electors' meeting* to be held as soon as practicable thereafter, for the purpose of voting approval or disapproval of such action.

(footnote continued on next page)

Charter Section 58(e) was adopted as part of the original Town Charter in 1951 and has not been amended since.[7] In the words of the District Court, it "is content neutral, directed blindly at those who oppose any resolution adopted by the Town's duly-elected representatives." There is no evidence and indeed no allegation that in adopting Section 58, along with the rest of the Charter 40 years ago, the Town's voters intended to discriminate against any identifiable class or to insulate the Town's elected officials from the popular will. Indeed, on its face Section 58 is clearly intended to, and in practice it does, provide a substantial check on the legislature's power to act contrary to the electorate's consensus. Neither the State of Connecticut nor the United States grants its citizens any similar power to implement widespread dissatisfaction with legislative enactments.

Because the Charter requires the special electors' meeting to be held "as soon as practicable" after the petition is submitted, a referendum was scheduled for February 7, 1989, 30 days after the Board of Selectmen noticed it and 57 days after the RTM vote.[8] No candidate for office or other ques-

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(e) Any action so submitted to a *special electors' meeting* shall stand approved unless a majority of those voting thereon shall have voted "No" and such majority shall exceed in number twenty-five percent of all the electors of the town as of the last annual municipal election.

(Emphasis added.)

7 In 1975, after a public hearing, the RTM debated various proposals to reduce or eliminate the minimum participation requirement of § 58(e). Formal resolutions to reduce the threshold percentage to 20% and to 15% were defeated, as was one to eliminate the requirement entirely and permit a bare majority of any number of voters to veto an RTM action.

8 Section 58, a veto provision, is materially different in this respect from traditional referenda statutes, the overwhelming majority of which ensure substantial voter turnout by requiring that the question

tion was on the ballot.[9] The election was announced in local newspapers. Opponents of the RTM action published advertisements urging "No" votes.

The polls were open from noon until 8:00 p.m. in conformity with Connecticut Gen. Stat. § 7-9b (when a "municipality conducts a referendum on a day other than a state or local election, the polls shall be open between noon and eight p.m."). This was two hours longer than the time required for a special electors' meeting under Charter Section 58 itself, which provides that for a veto referendum the polls need be open only from 2:00 p.m. until 8:00 p.m.

All voters used the same central, convenient location, the Town Hall, where two of the Town's six districts vote in general elections. (The Town is only 14.9 square miles.) This conformed with the Connecticut Secretary of State's 1988 Advisory Guidelines Concerning Municipal Referendum Not Held In Conjunction With A Regular Or Special Election, which provide that "municipalities may choose to use fewer polling places than normally used in a regular election," and notes that "nothing in the general statutes . . . mandates the use of the same polling places" as in elections. Notices were posted in the other four locations sometimes used as polling places advising voters to go to Town Hall. Twelve voting machines were used, the same number used in recent general elections. Absentee ballots were available.

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be posed, not at a special election held on just a few days' notice, but at a regularly scheduled election no fewer than a fixed number of months hence. *E.g.* Alaska Const. art. 11, § 5; Cal. Const. art. II, § 9; Me. Const. art. 4, pt. 3, § 17; Mass. Const. art. 48, pt. 3, § 3; Neb. Const. art. III, § 3; Ohio Const. art. II, § 1c; Wyo. Const. art. 3, § 52.

9 The question posed in the referendum was the following:

"Shall the following action of a town meeting held on December 12, 1988 be approved: Resolution approving an appropriation and bond authorization of $2,000,000 for the purchase of the Prindle-Hopkins property on the northeast corner of Leroy Avenue and Squad Lane to be used for moderate rental housing?"

The decisions concerning voting hours and numbers of polling places were not made by anyone involved in the Town's decision to buy the Prindle-Hopkins property. The decisions were made by the Town Clerk and the registrars of voters for both major parties, none of whom serves on the RTM, the Board of Selectmen, or the Board of Finance. The undisputed evidence established that their decision was not based on any interest in the outcome of the referendum, but rather on consideration of the number of people likely to want to vote in such a special election and the facilities needed to accommodate them, and the extra costs associated with multiple polling places.

On the day of the veto referendum, 3,842 residents voted. While this 37% voter turnout was below the 89% participation in the 1988 presidential election, it was virtually indistinguishable from the percentage turnout in the last veto referendum under Section 58, held in 1972, even though in that referendum six polling places were open from 6:00 a.m. until 8:00 p.m. Both courts below found no evidence that any citizen eligible and wanting to vote against the RTM action was unable to do so because of the voting hours, the number of polling places, or for any other reason.

While the number of persons voting to veto the RTM's action constituted a majority of those casting ballots, they did not constitute even one quarter of all registered voters. The attempted veto therefore failed, and the RTM action stood. This result was also indistinguishable from the last veto referendum in 1972, when more polling places and longer hours were employed. Then, the "No's" also constituted a majority of those voting, but fewer than 25% of the registered voters.

D. Proceedings In The Courts Below.

Eleven Town residents, all of whom did vote in the referendum, filed suit in the United States District Court for the District of Connecticut on March 16, 1989, against the Town and over 112 of its elected officials. Petitioners alleged that

Charter Section 58 violated the one person/one vote principle, and was contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and that the individual respondents conspired to deny petitioners their constitutional rights, in violation of 42 U.S.C. §§ 1983 and 1985. Petitioners sought preliminary and permanent injunctive and declaratory relief (a) declaring Charter Section 58(e) unconstitutional, (b) declaring the "No's" the winners of the referendum, and (c) enjoining the Town and its officials from proceeding with the bond issue. Petitioners also sought damages of $2 million against the Selectmen and the Town's attorney.

Petitioners sought a temporary restraining order and a preliminary injunction at the outset of the case enjoining the Town from issuing the bonds or buying the property. After a full evidentiary hearing at which petitioners presented testimony from several witnesses, the District Court denied the motion on April 6, 1989, finding no probability of success on the merits or even sufficiently serious questions to make fair ground for litigation.[10] Petitioners did not appeal the denial of the preliminary injunction, seek an injunction from the Court of Appeals, or seek an expedited trial. The Town accordingly issued the debt and closed the acquisition, taking title to the property on May 24, 1989.

The District Court ordered discovery completed within six months after the filing of the complaint. Petitioners sought no discovery prior to that deadline. Afterwards, all parties moved for summary judgment. The District Court granted summary judgment for respondents on June 29, 1990.

Finding that the parties agreed as to the material facts, the District Court ruled that Section 58 is "content neutral,

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10 The District Court expressly found that the Town Hall polling place was "central and convenient" and had not been selected "for any improper reason." The court found that the evidence petitioners introduced to support their conspiracy theory actually established facts "quite to the contrary."

directed blindly at those who oppose any resolution adopted by the Town's duly-elected representatives" and therefore does "not discriminate against any identifiable class" or "unconstitutionally denigrate[ ] [petitioners'] voting power." The District Court found that the Town had "an obviously legitimate governmental interest in adopting referendum procedures that will prevent the rejection of a considered decision of the [legislature] by a fraction of electors too few in number adequately to present the best interests of other town residents." The District Court thus rejected the claim that Section 58 is unconstitutional, relying on this Court's opinion in *Gordon v. Lance*, 403 U.S. 1 (1971).

Concerning the claim that the referendum was conducted in a manner designed to frustrate participation, the District Court found as follows:

> Plaintiffs have not offered evidence of a single individual who was prevented from voting due to the reduced hours the polling location was open. Nor have they offered any evidence that this location was so crowded that lines formed so as to delay unreasonably any voter in his or her effort to exercise the right to vote . . . [P]laintiffs have offered no evidence that defendants' actions deprived any voter of a reasonable opportunity to vote, of reasonable access to the voting place, or to a reasonable amount of time to vote within a private and enclosed space . . . Indeed, plaintiffs have failed to offer evidence that any of defendants' actions caused potential voters to stay away at all.

A unanimous panel of the Court of Appeals for the Second Circuit affirmed on March 1, 1991. The Court of Appeals concluded that *Gordon v. Lance* "compels" judgment for respondents. The Court found that the 25% threshold served a "rational, nondiscriminatory purpose" and that it "simply accords added weight to the decision of elected officials." The Court of Appeals found that there was no

evidence whatever to support the conspiracy claim under Sections 1983 and 1986.[11]

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS OR ANY OTHER FEDERAL COURT AND DOES NOT REACH ANY NEW OR UNRESOLVED QUESTION OF LAW.

The decision below did not address or decide any novel or unresolved question of law. The ruling below does not conflict with, and indeed is in perfect harmony with, every relevant decision of this and every other federal court. Moreover, petitioners expressly disavow any desire to have this Court revisit or overrule the decision from this Court that, in the words of the Court of Appeals, "compels" judgment for respondents, *Gordon v. Lance*. Petitioners fail to explain why the opinion in *Gordon* does not directly control this case, why the facts of this case do not fall within the rationale and reasoning of *Gordon*, or why a result directly at odds with the rule of *Gordon* would be appropriate here.

In *Gordon v. Lance*, 403 U.S. 1 (1971), the Court held that provisions of West Virginia's constitution and statutes requir-

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11 The dispute between the parties is now moot, largely because petitioners failed to appeal the District Court's denial of a preliminary injunction. Petitioners no longer seek money damages from the individual respondents or an injunction against the issuance of the bonds or the purchase of the property, and instead ask only for a declaration that they won the referendum. But such a declaration would be academic because the District Court no longer has the power to award or enforce any remedy. The Town has incurred the debt and has owned the land for two years and cannot force the Prindles and Hopkins to rescind the sale. Indeed, at the hearing before the District Court on their motion for a preliminary injunction, petitioners' counsel admitted that, absent equitable relief, the transaction would not be "reversible."

ing the affirmative votes of 60% of those voting in a referendum before political subdivisions could incur bonded indebtedness did not violate the Equal Protection Clause. The Court ruled that, when all citizens are entitled to vote and no citizen's vote is weighed more heavily than another's, the Constitution does not require that a simple majority of those casting ballots always prevail. The Court held that the supermajority provisions did not discriminate against any identifiable class and therefore did not violate the Equal Protection Clause.

Significantly, the Court specifically stated that it saw no constitutional distinction between the supermajority provision at issue in that case and provisions, such as the one at issue here, requiring the affirmative votes of a minimum percentage of the entire population—even if the prescribed threshold were far higher than Darien's Section 58(e). As the Court stated: "we see no constitutional distinction between the 60% requirement in the present case and a state requirement that a given issue be *approved by a majority of all registered voters* [even though] the latter requirement would be far more burdensome." 403 U.S. at 7 n.5 (emphasis added). Inasmuch as the Court thought it beyond discussion that a 50% minimum participation requirement was inoffensive, the 25% threshold at issue here clearly did not deny petitioners equal protection of the laws. *See Clay v. Thornton*, 169 S.E.2d 617 (S.C. 1969), *appeal dismissed*, 397 U.S. 39 (1970); *Hall v. Thornton*, 445 F.2d 834 (4th Cir. 1971).

The *Gordon* Court relied on its earlier decision in *Fortson v. Secretary of State*, 385 U.S. 231 (1966), in which the Court had upheld an electoral system that permitted the runner up in a gubernatorial election to win the race. If no candidate commanded a majority in the general election, the state legislature, not the voters, chose from among the two top finishers. Therefore, a candidate could win the election without ever demonstrating greater voter support than his rival. The Court rejected a claim that the system violated the Equal Protection Clause by diluting the ballots cast for the top vote getter.

The Court's opinion in *Gordon* has been viewed as resolving, entirely and finally, the question posed by this case—whether the Constitution requires that a referendum be deemed won by whichever side received 50.1% of the vote. The Court itself interpreted *Gordon* six years later as holding that "a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class." *Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 268 n.13 (1977).[12]

During the two decades since *Gordon*, dozens of similar state constitutional provisions, statutes, and ordinances, nationwide, have been in place.[13] In addition, at least twelve

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12 *See City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (upholding city charter requiring zoning variations to be approved by 55% of referendum vote); *Lefkovits v. State Board of Elections*, 400 F. Supp. 1005 (N.D. Ill. 1975), *aff'd*, 424 U.S. 901 (1976) (upholding law requiring judge seeking retention to amass 60% of votes cast); *LoFrisco v. Schaffer*, 341 F. Supp. 743 (D. Conn.), *aff'd*, 409 U.S. 972 (1972) (upholding minority representation statute restricting number of candidates single party may nominate for multi-member board and number of candidates for whom each citizen may vote); *Brenner v. School Dist.*, 315 F. Supp. 627 (W.D. Mo. 1970), *aff'd*, 403 U.S. 913 (1971) (upholding requirement that tax levy obtain 67% approval at referendum); *Bogert v. Kinzer*, 465 P.2d 639, 647 (Idaho 1970), *appeal dismissed*, 403 U.S. 914 (1971) (two-thirds referendum majority required to incur debt); *Baker v. Regional High School Dist. No. 5*, 476 F. Supp. 319, 322-23 (D. Conn. 1979) (upholding law permitting minority of school board members to block measures supported by majority); *Whalen v. Heimann*, 373 F. Supp. 353, 358 (D. Conn. 1974) (upholding veto referendum provision identical to Darien's Charter § 58); *George Benz & Sons v. Hardin*, 342 F. Supp. 88, 91 (D. Minn. 1972) (2/3 majority required for certain referenda); *Kaelin v. Warden*, 334 F. Supp. 602, 605 (E.D. Pa. 1971) (upholding law permitting each voter to cast ballots for only two candidates running for three-member board).

13 *E.g.*, Idaho Const. art. 8, § 3 (2/3 vote); Iowa Code Ann. § 75.1 (West 1991) (60% vote); Ky. Const. § 157 (2/3 vote); Miss. Code Ann.

municipalities in Connecticut alone provide for veto referenda and require a minimum vote of all registered voters.[14]

Gordon and its progeny control this case and petitioners do not seek to disturb *Gordon*. The Petition poses no question worthy of review.

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§ 21-33-311 (1990) (3/5 vote); Miss. Code Ann. § 37-59-17 (1990) (3/5 vote); Miss. Code Ann. § 19-9-17 (1972) (3/5 vote); Mo. Const. art. 6, § 26(b) (2/3 vote); Mont. Code Ann. § 7-7-4235 (1989) (if voter turnout is more than 30% but less than 40%, proposition is approved only upon a favorable vote of at least 60% of voters; if voter turnout is 30% or less, the measure is considered rejected); N.H. Rev. Stat. Ann. § 33:8 (1988) (2/3 vote and a minimum turnout of the voters); N.M. Const. art. IV, § 1 (any law can be repealed by electorate upon presentation of petition and a majority vote to reject, provided the total votes are not less than 40% of the votes cast at the general election); N.Y. Const. art. 8, § 4(h) (60%); N.Y. Local Fin. Law § 104.00(c)(1) (McKinney 1968) (60%); N.Y. Local Fin. Law § 104(e) (McKinney 1968) (2/3 vote); N.D. Cent. Code § 21-03-07 (Supp. 1989) (60%); Okla. Const. art. 10, § 26 (3/5 vote); S.C. Const. art. VII, § 8 (incorporation of new municipalities and readjustment of boundaries are subject to consent of a majority of electors voting in election who reside in and are entitled by law to vote within the district proposed to be incorporated); S.D. Codified Laws Ann. § 9-26-1 (1981) (60%); Tenn. Const. art. 2, § 29 (3/4 vote); Tex. Const. art. 3, § 52(b) (2/3 vote); Wash. Const. art. 8, § 6 (3/5 vote); W. Va. Const. art. 10, § 7 (3/5 vote); W. Va. Const. art. 10, § 8 (3/5 vote).

14 Branford Town Charter § 8; Cromwell Town Charter § C605; East Hartford Town Charter § 8.5; Ellington Town Charter ch. VI, § 605; Enfield Town Charter ch. III, § 7; Fairfield Town Charter art. VI; Greenwich Municipal Code § 174; Killingly Town Charter § 508; Plainville Town Charter § 9; South Windsor Charter § C313; Torrington Code § C4-7; Waterford Town Charter § 3.1.14.

II.

THE COURTS BELOW CORRECTLY APPLIED WELL-SETTLED PRINCIPLES TO UNDISPUTED FACTS.

A. Section 58(e) Cannot Violate The Equal Protection Clause Because It Does Not Discriminate Against Any Identifiable Class.

Both Courts below concluded that Section 58(e) does not discriminate against any identifiable class. It is facially neutral because it makes no classifications and treats petitioners no differently than any other registered voter. All adult citizens are eligible to register to cast one vote; all votes count equally.

Of course, after the referendum, just as after any election, it is possible to identify the persons whose wishes were frustrated because of Section 58(e). But, because Section 58(e) may be invoked regardless of the subject matter of the legislation at issue, it is simply not possible to know or even guess in advance who will be helped or hurt by Section 58(e). And there is no reason to believe that those burdened by it in one referendum will not be helped by it in the next one.

As the Court put it in *Gordon*, to sustain a challenge to an election law under the Equal Protection Clause, a plaintiff must demonstrate as a threshold matter that the law creates an "independently" identifiable class, that is, a class that may be described independent of the election results. 403 U.S. at 7. *See LoFrisco v. Schaffer*, 341 F. Supp. 743, 749 (D. Conn.), *aff'd*, 409 U.S. 972 (1972) ("Dilution [of votes] is not cognizable under the Fourteenth Amendment unless [groups are discriminated against because] of some *a priori* characteristic unrelated to how they vote and to the subject matter of the election."); *Brenner v. School Dist.*, 315 F. Supp. 627, 634 (W.D. Mo. 1970), *aff'd*, 403 U.S. 913 (1971) (decisional rules for referenda do not involve an identifiable class of voters because it is unknown before the election how the electorate will vote).

Petitioners' proposed class ("opponents of the status quo") does not meet the standards set forth in *Gordon*. Indeed, a similar class could have been defined in *Gordon*: those who favor bonded indebtedness over other forms of financing. But as the Court in *Gordon* stated, there was "no *independently* identifiable group or category that favors bonded indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5 (emphasis added).[15]

B. Section 58(e) Does Not Infringe Upon Any Fundamental Right.

Petitioners do not and could not claim they were disenfranchised. Instead, they argue that the minimum turnout provision diluted their votes and that therefore § 58(e) runs afoul of the one person, one vote doctrine. But a vote is not diluted simply because the state adopts a rule of decision other than the most common one: a simple majority of the votes actually cast. "[T]here is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." *Gordon*, 403 U.S. at 6. *See Fortson v. Secretary of State*, 385 U.S. 231 (1966).

Moreover, the suggestion that Section 58 frustrates majority rule is misguided. Petitioners' argument rests on the unstated assumption that the Constitution requires all non-

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15 Moreover, the uncontroverted evidence flatly refutes petitioners' arguments concerning the effect of Section 58. The veto provision has been invoked only four times in 40 years. On only two occasions did the majority of votes cast not prevail. The land purchase and bond issue were approved unanimously at public meetings by three Town Boards and by an 85% margin in the RTM. Those Town officials had just recently been elected by a high percentage of all registered voters. The Town's government features high voter participation, short terms, high turnover, nominal or no pay, a legislature with no party affiliations and a very low constituent-to-representative ratio, and mandatory minority party representation on Town Boards. And there is no evidence that Charter Section 58 was enacted for the purpose of weakening, rather than strengthening, popular control over elected officials. *Cf. James v. Valtierra*, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice").

participating voters to be counted either (i) not at all, (ii) as if they had all voted the same way as the majority of participating citizens voted, or (iii) as if they all divided their votes in the same proportions as did those citizens who did vote. But nothing in the Constitution prevents a state from counting the votes of registered, non-participating voters as if they had all voted with the minority of those who voted. Indeed, this is precisely what the Court ruled in *Gordon* when it referred approvingly to a statute requiring voters seeking to pass a referendum to garner the support of a majority of all voters, not merely of all votes cast. 403 U.S. at 7-8, citing with approval *Clay v. Thorton*, 169 S.E.2d 617, 620 (S.C. 1969), *appeal dismissed*, 397 U.S. 39 (1970) *See County of Cass v. Johnston*, 95 U.S. 360 (1877); *Harshman v. Bates County*, 92 U.S. 569 (1875).

C. Section 58(e) Is Rationally Related To A Legitimate State Interest.

Section 58(e) is a rational means to serve legitimate government ends. It reflects a thoughtful compromise between two commendable goals: first, retaining for the electorate ultimate control over the resolution of significant issues, even in between elections, and, second, preventing laws enacted by a majority of duly elected representatives from being overturned by a small minority of the population. Absent the minimum turnout provision of Section 58(e), a law passed unanimously by the RTM and all Town Boards could be vetoed by any number of citizens, no matter how small, who managed to organize themselves promptly and participate in a hastily scheduled, single issue special election at which turnout would surely be modest. *Whalen v. Heimann*, 373 F. Supp. 353, 358 (D. Conn. 1974) (town has "obviously legitimate governmental interest in adopting referendum procedures that will prevent the rejection of a considered decision of the Town Council by a faction of electors too few in number adequately to present the best interests of other town residents").

The nation's history confirms the wisdom of occasionally requiring a stronger consensus than a bare majority of votes cast. The Constitutions of the United States and of the various states are replete with provisions requiring either a supermajority or a minimum participation for legislative action. For example, the U.S. Constitution requires a two-thirds vote to convict an impeached official,[16] expel a member,[17] override a veto,[18] approve a treaty,[19] propose a constitutional amendment,[20] or find the President unable to discharge his duties.[21]

Moreover, a majority of members must be present for the transaction of business in either House,[22] and a two-thirds quorum is required when the Senate elects the President.[23] These quorum rules mean that, even when a simple majority of votes is sufficient to enact legislation, the affirmative votes of more than 25% of the members are always required.

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16 Article I, § 3, cl. 6.

17 Article I, § 5, cl. 2; *see also* Amendment XIV, § 3 (requiring vote of two-thirds of each House to expel members involved in the insurrection).

18 Article I, § 7, cl. 2.

19 Article II, § 2, cl. 2.

20 Article V (also requiring ratification by the legislatures or conventions of three-fourths of the states). *See Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (upholding state constitutional provision requiring 3/5 vote of each House to ratify proposed amendment to U.S. Constitution). *See also* Article VII (requiring votes of nine of thirteen original states for ratification of Constitution).

21 Amendment XXV, § 4, cl. 2.

22 Article I, § 5, cl. 1; *see United States v. Ballin*, 144 U.S. 1 (1892).

23 Amendment XII (also requiring an absolute majority of all states, regardless of how many states actually vote).

CONCLUSION

For the reasons set forth above, and in the opinions of the Court of Appeals and the District Court, respondents respectfully request that this Court enter an order denying petitioners' petition for a writ of certiorari.

Dated: August 21, 1991

Respectfully submitted,

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No. 91-23

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOELLYN GRAY, CHRISTOPHER M. SMITH, MALCOLM HALL, JR., BEEKMAN V. BEAVERS, DAVID ERB, and ALBERT DURYEA,

Petitioners,

v.

THE TOWN OF DARIEN, The Board of Selectmen, Board of Finance and other Boards and Commissioners, acting singly or in concert, in whole or in part, together with all officers, employees, agents and attorneys thereof,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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IN THE
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v.

THE TOWN OF DARIEN, The Board of Selectmen, Board of Finance and other Boards and Commissioners, acting singly or in concert, in whole or in part, together with all officers, employees, agents and attorneys thereof,

Respondents.

ARGUMENT

Respondents have rewritten the history of the February 7, 1989 Darien, Connecticut bond referendum election in order to portray the election as being fair instead of an election in which the government officials of Darien so manipulated the process to deny the opponents of "city hall" their fundamental right to vote. A brief review of the facts, set out more fully in the Petition, is necessary to put the Respondents' claims in context.

The referendum election was an attempt by citizens of Darien to overturn a decision of the town officials to

indebt the town with an issuance of bonds to finance public moderate-income rental housing. In that election, the Board of Selectmen reduced the number of polling places from the normal four-to-six to only one, and sharply reduced the operating hours for that single polling place from the normal 6:00 a.m. to 8:00 p.m. period to 12:00 noon to 8:00 p.m.

The limitation on voting was significant because Section 58(e) of the Darien Town Charter requires that in order for the citizens of Darien to overturn a decision of the town government in a referendum election, the votes of opponents of the town decision both must constitute a majority of the votes cast and must exceed 25% of the town's registered voters as of the last annual municipal election.

The obstacles to voting prevented the opponents of the town officials' bond decision from achieving electoral success because low voter turnout worked in favor of the proponents of the town establishment's position. The Darien Town Charter provision and the manipulation of the voting procedures in Darien had a significant impact upon the Petitioners' right to vote. Although the citizens won an overwhelming percentage of the vote, they failed to "win" the election because they fell short of the 25% threshold level.

Respondents attempt to camouflage their manipulation of the electoral process by portraying the bond purchase decision as a popular democratic decision and the referendum election procedures as being dictated by state law and made by individuals other than the Darien Board of Selectmen (Op. 2-10).

In an attempt to bolster the legitimacy of the 25% threshold referendum requirement, the Respondents portray

the election of Town Selectmen as being based upon a broad popular consensus. Respondents state that the citizens of Darien had a keen interest in local elections and that there was intense competition for Darien town government positions (Op. 3). However, while Section 58(e) requires a minimum vote of 25% of the electorate, there is no minimum vote requirement for election to the Darien Board of Selectmen. In fact, over the last ten years many members of the Darien Board of Selectmen have been elected by less than 25% of the registered voters -- the threshold level required for the defeat of the bond issue.

Respondents state that the hours of the polls were in conformity with Connecticut Gen. Stat. § 7-9b (Op. 6). However, Connecticut Gen. Stat. § 7-9b provides the *minimum* hours which polls must be open in a referendum election. The statute authorizes municipalities to open polls in a referendum election as early as 6:00 a.m. --- the time the polls were opened in previous elections in Darien, including referendum elections. While limited election hours may be legitimate in some circumstances, in the 1989 Darien bond referendum election the contraction of election hours served the purpose of favoring one side in the election -- the government officials -- at the expense of the opponents of the bond issue. That was because limited hours served as a barrier to voting, thereby making it more difficult to reach the 25% threshold required by the Darien Town Charter.

Respondents also cite a Connecticut Secretary of State Advisory Opinion concerning the number of polling places as a basis to support the town officials' decision to limit the number of polling places to one. That advisory opinion states that "municipalities *may* choose to use fewer polling places than normally used" (emphasis added). The town had the right to open all the polling

places -- as it had done in past elections -- but did not do so. If the special election did not have the 25% threshold level requirement, the reduced number of polling places might not have been significant. However, as with the reduced hours the polls were open, the use of only one polling place was an impediment to voting and hence worked in favor of the town officials and against those who were fighting "city hall."

Furthermore, even if the state law mandated rather than advised Darien with respect to the number of polling places and the hours voting was permitted, Darien could not rely on state statute to justify violations of constitutional rights.

Respondents also claim that the decision to limit the number of polling places and the hours of the election was made by the Town Clerk and Registrars of Voters for both major parties (Op. 7). However, the Town Clerk has no authority to set the hours of the referendum election. That authority is held solely by the town selectmen. Darien Charter § 58 (b). With respect to the limitation of the number of polling places to only one, Registrar Carolyn Miller testified at the hearing on the plaintiffs' motion for a preliminary injunction, "We were not consulted as to whether it was a good idea or bad idea to have one polling place. The decision was made and we were asked if we could handle it."

Respondents claim that the case is now moot (Op. 10 n. 11). Nothing could be further from the truth. No bonds have been issued by the Town of Darien. The proposed housing projects have not been built, and the land stands idle. If the Petitioners prevail, the town could sell the land, thus restoring the pre-referendum status of the housing project.

In their argument, Respondents claim that the decision below does not conflict with any decision of this or any other federal court (Op. 10). As pointed out in the Petition, the decision of the court below conflicts with decisions of this and other courts concerning the Equal Protection Clause of the Constitution (Pet. 11-18). The decision below conflicts with this Court's decisions striking down voter classifications where groups of voters have been unconstitutionally subject to limitations on their voting rights. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Gray v. Sanders*, 372 U.S. 368 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

In the case at bar there is an identifiable group or category that is singled out as a "discrete and insular minority" for special treatment. That group is those residents who oppose "city hall." The only elections that trigger the 25% threshold level are those that involve attempts to overturn decisions of the government officials. The class singled out are those voters who oppose the actions of the entrenched politicians.

While this Court struck down as unconstitutional governmental in the above cases classifications limiting voters who are outside the government power structure, the court below upheld a governmental classification which so diluted the right to vote of Petitioners -- citizens on the outside of the political establishment -- so as to effectively deny them their right to vote.

Respondents attempt to justify this infringement upon the right to vote by arguing that the minimal vote

requirement is rationally[1] related to a legitimate state interest -- preventing an unrepresentative minority of citizens from overturning laws (Op. 16-17). There is an implicit assumption in Respondents' argument that the town officials represent the views of the majority of voters. However Darien town selectmen are often elected by less than the numbers of voters who supported the rejection of the bond issue. There is no evidence that supports Respondents' theory that the threshold requirement will protect against minority rule. Furthermore, in this case the minimal vote requirement was combined with governmental decisions that effectively assured a low voter turn-out. The restriction on polling places and hours does not demonstrate a concern to prevent minority rule; rather, it represents an attempt to prevent majority rule.

Respondents further argue that this Court's decision in *Gordon v. Lance*, 403 U.S. 1 (1971), mandates the decision below (Op. 10-13). However, as Petitioners pointed out in the Petition for a Writ of Certiorari, *Gordon* not only does not compel the decision of the court below but is inconsistent with it (Pet. 13-18).

Gordon is distinguishable from the case at bar for a number of reasons. First, the state interest served by the supermajority requirement in *Gordon* was to prevent government from easily indebting "generations yet unborn." *Gordon* at 6. In the case at bar the election procedure facilitates indebting "generations yet unborn."

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[1]Since there is a fundamental right -- the right to vote -- that is burdened in this case, the government must show a *compelling* and not merely a rational interest to justify the infringement. *Williams v. Rhodes*, 393 U.S. 23 (1968).

Secondly, the supermajority requirement challenged in *Gordon* was a simple supermajority. The case at bar combines a supermajority requirement with actions by the Darien town officials to prevent a fair referendum. Had the hours of operation of the polling places and the number of polling places not been constricted, the opponents of the bond issue would likely have been able to win a supermajority. In most elections, the candidate or the issue which receives a majority of the votes cast wins no matter how low the voter turnout. Even where supermajorities are required, the voter turnout is generally irrelevant as long as the winner achieves the percentage necessary to pass the ballot measure. However, in the Darien bond referendum election, the voter turnout was a key factor in deciding whether the politicians who controlled the Darien town government or the opponents of "city hall" would win the election. Because the Darien Town Charter requires opponents of the town officials' position to achieve not only a majority of the votes to overturn a decision of the town officials but also a threshold vote of 25% of the eligible voters -- as of the last general election -- voter turnout was the key to success or defeat.

Finally, the supermajority provision upheld in *Gordon* did not single out an identifiable group or category for discriminatory treatment; the referendum election provision of the Darien Town Charter does. In *Gordon*, this Court held that the supermajority provision at issue in that case "singles out no 'discrete and insular minority' for special treatment" *Gordon*, 403 U.S. at 5. Respondents argue that this case is similar to *Gordon* and that "it is simply not possible to know or even guess in advance who will be helped or hurt by Section 58(e)" (Op. 14). It is possible to know who is hurt by Section 58(e). The citizens hurt by Section 58(e) are those citizens who wish to "fight city hall" (Pet. 11-18).

Citizens on the outside of the political establishment are an identifiable group of people whose right to equal protection of the laws has been violated by Darien government officials. This Court has recognized that government officials may not discriminate against political "outsiders." *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Clements v. Fashing* 457 U.S. 957 (1982). In *Celebrezze*, this Court recognized the supporters of an independent candidate as a class consisting of "an identifiable segment of . . . . independent voters." 460 U.S. at 792. Petitioners are an identifiable segment of independent voters -- the opponents of "city hall."

Finally, as discussed above, Respondents' argument that Petitioners failed to distinguish this case from *Gordon* is false. Furthermore, when this Court decided *Gordon* it distinguished *Gordon* from *Hunter v. Erickson*, 393 U.S. 385 (1969). While Petitioners have distinguished this case from *Gordon*, Respondents have ignored this Court's decision in *Hunter*. As pointed out in the Petition, this case is more like *Hunter* than *Gordon* since the Darien Town Charter imposes a special election requirement only when the policies of the political establishment are challenged (Pet. 14). The decision of the court below conflicts with *Hunter* and the equal protection cases involving the fundamental right to vote. It is those cases, rather than *Gordon*, which control the issues raised by this case.

CONCLUSION

The petition for certiorari should be granted.

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